IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 18TH JANUARY 2007 / 28TH PAUSHA 1928

WP(C).No. 13198 of 2006(U)

OS.342/1999 of MUNSIFF COURT, TIRUR

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PETITIONER:

UMMAYYAKUTTY UMMA, D/O.SAIDALIKUTTY,
KACHERITHODUVIL, CHEMBRA, TIRUR,MALAPPURAM DIST.

BY ADV. SRI.T.KRISHNAN UNNI

RESPONDENTS:

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1. SUHARA, D/O. KUNHIMOIDEENKUTTY,
MULLAKKANAKATHU HOUSE, CHEMBRA, TIRUR.

2. RAZHEED, S/O. KUNHIMOIDEENKUTTY,
MULLAKKANAKATHU HOUSE, CHEMBRA, TIRUR.

3. RAZHEENA, D/O. KUNHIMOIDEENKUTTY,
MULLAKKANAKATHU HOUSE, CHEMBRA, TIRUR.

4. ALI ASKAR, S/O. KUNHIMOIDEENKUTTY,
MULLAKKANAKATHU HOUSE, CHEMBRA, TIRUR.

5. SAINABA, W/O. KUNHIMOIDEENKUTTY,
MULLAKKANAKATHU HOUSE, CHEMBRA, TIRUR.

6. AMBALAPARAMBIL YOUSAF, S/O. MOHAMMED,
ALINCHUVADU, NIRAMARUTHUR, MALAPPURAM DISTRICT.

BY ADV. SRI.K.RAMACHANDRAN
SMT.R.MEERA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 18/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX:

EXT.P1: COPY OF DECREE OF MUNSIFF COURT, TIRUR IN OS 342/99 DT.28/2/03

EXT.P2: COPY OF ORDER IN EP.71/03

//True copy//

SHW TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO.13198 OF 2006

Dated 18th January 2007

J U D G M E N T

Petitioner is the judgment debtor. Respondents 1 to 5 are decree holders and 6th respondent the auction purchaser in O.S.342/99 on the file of Munsiff court, Tirur. Towards realisation of decree debt respondents 1 to 5 filed E.P.71/2003, for attachment of the property of the petitioner. Property was sold in court auction sale and purchased by 6th respondent. When the execution petition was posted for confirmation of sale, judgment debtor filed this petition under Article 227 of Constitution of India contending that total extent of property sold in E.P is 63 cents and for realisation of decree debt it is not necessary to sell the entire property and executing court under Rule 64 of Order XXI of Code of Civil Procedure has to sell only that portion of attached property, which is necessary to realise decree debt and as it was not considered executing court has no jurisdiction to direct sale of the

property and executing court is bound to consider the question before confirmation of sale. According to petitioner he apprehends that if that objection is taken before executing court that may not be accepted and therefore this petition is filed to set aside the sale and to permit petitioner to pay the decree debt in instalments.

2. Learned counsel appearing for petitioner and respondents were heard.

3. Learned counsel appearing for petitioner relying on the Division Bench ruling of this court in **Gnan Das v. Paulin Moraes (1998 (2) KLT 88)** argued that before directing sale executing court is bound to consider the mandate provided under Rule 64 and if that has not been complied, it is a ground which could be taken in an application filed under Rule 90 to set aside the sale.

4. Question is whether petitioner is entitled to approach this court to set aside the sale, when petitioner has a remedy provided under Rule 90 of Order XXI of the Code. Even as per the decision relied on by the learned counsel appearing for petitioner, the contention raised by petitioner could be urged and if urged is to be considered by executing court in an

application filed under Rule 90 of order XXI. For the reason that petitioner apprehends that executing court may not accept the contention, is not a ground to approach this court before approaching the executing court. This petition is disposed with liberty to petitioner to file an application under Rule 90 of Order XXI of Code to set aside the sale raised all the contentions raised herein. Petitioner can also raise the contention before the executing court before confirming the sale. It is submitted by learned counsel appearing for petitioner that Rs.25,000/- as directed by this court on 24/5/2006 was deposited before executing court.

Writ petition is disposed accordingly.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.